Supreme Court, U.S.
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No.96-1999

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SONJA INDRELAND McLAUGHLIN,
Petitioner,
v.
WASHINGTON STATE BAR ASSOCIATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Ninth Circuit Court of Appeals has rendered a MEMORANDUM affirming the dismissal of Petitioner's 42 U.S.C. 1983 action on Fed.R.Civ.P. 12 (b)(1) motion by Defendants, based upon a longstanding routine abstention policy of the Ninth Circuit, which abstention policy conflicts with relevant decisions of the Supreme Court of the United States, and which abstention policy places an unconstitutional burden upon the Petitioner in her effort to vindicate federally protected rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States of America. The question thereby arising is:

Whether the Ninth Circuit Court of Appeals has entered a federal question jurisdictional ruling so in conflict with the Constitution of the United States and the relevant decisions of the Supreme Court of the United States as to call for the exercise of the supervisory power of the Supreme Court to conform the federal question jurisdictional policy of the Ninth Circuit to that adhered to by the Nation as a whole?

TABLE OF AUTHORITIES

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) [hereinafter called *Feldman*].....Pages 2,3,7

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Supreme Court of the United States

October Term, 1996

No. 96-1999

Sonja Indreland McLaughlin
v.
Washington State Bar Association, *et al.*,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The BRIEF IN OPPOSITION does not contest any fact from the PETITION FOR WRIT OF CERTIORARI. Instead, the Washington State Bar Association [hereinafter called WSBA], changes the Question Presented of the PETITION, and then makes an argument in reply to its new question, disregarding the one presented by the Petitioner.

The WSBA's new "question presented" is easier for it to answer. It says that McLaughlin *"now seeks improper federal court interference in a state court disciplinary matter,"* which carries the implication that state court disciplinary matters are sacred cows, immune from federal scrutiny.

However, ***the change in the question presented does the WSBA no good.*** The WSBA is not able to prove the existence of a proceeding in which McLaughlin's federally secured rights were adjudicated before a state court of competent jurisdiction. Without showing of actual, adequate judicial proceedings covering McLaughlin's

federally secured claims, the WSBA can not get around the ***Feldman*** and ***Middlesex*** opinions[1]. The remaining argument is fatally weakened.

The WSBA simplistically asserts that the mere existence of the ORDER of October 6, 1992, is enough to prevent McLaughlin from gaining federal question subject matter jurisdiction in federal district court for a 42 USC 1983 lawsuit against the WSBA, solely on the basis that the ORDER issued out of the Supreme Court of Washington, and despite the fact that the ORDER says nothing.

But on its face, the RLD 7.3(a), reproduced in the BRIEF, shows that McLaughlin had no recourse as of right, whatsoever, to judicial proceedings before a court of competent jurisdiction to litigate the depravation of her federally secured rights. By WSBA reasoning, McLaughlin would end up not having her federal claims and those of her community adjudicated in judicial proceedings in a state court of competent jurisdiction, at all. Yet, at the same time she would end up being barred from federal district court by an ORDER that says nothing but means that McLaughlin can not get into state court with her federal claims.

The BRIEF IN OPPOSITION is a demonstration of the logic which traps the attorney whose federally protected rights have been violated by the administrators at the WSBA. RLD 7.3(a), quoted in the BRIEF, plainly states that all administrative proceedings that do not involve suspension or disbarment are not subject to judicial scrutiny, except in such cases as the Supreme Court of Washington chooses, in its discretion, to entertain. Censures and reprimands are not appealable in Washington, yet Washington attorneys can not bring a 42 USC 1983 action, because of the "*MacKay* Rule". This becomes very serious when the WSBA has taken unto itself to regulate topical political speech under RPC 8.2(a)(b).

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[1] District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) [hereinafter called Feldman];Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, (1982).[hereinafter called Middlesex.

I. The BRIEF IN OPPOSITION effectively concedes various elements of the argument on the Petition for Writ of Certiorari to McLaughlin. The first and most important concession comes in this statement:

> *"Petitioner labors under the misapprehension that her claims...were not the subject of a judicial proceeding. If that were the fact, it might provide a basis for her claim to be heard in District Court...."[emphasis added]*

This statement concedes the proposition that in order to successfully gain abstention from adjudication of McLaughlin's 42 USC 1983 federal claims in federal district court, the F.R.Civ.P. 12(b)(1) motion must show that those 42 USC 1983 federally protected claims have been adjudicated before a competent state court in an adequate judicial proceeding.

The WSBA has unintentionally recognized that it can not stand against the rulings in ***Feldman, Middlesex,*** and dozens of other such abstention rulings entered by the Supreme Court of the United States. The WSBA has inadvertently recognized now that no citizen, not even an attorney, can be denied a federal forum for litigation pertaining to the vindication of federally guaranteed rights, unless an adequate state forum before a court of competent jurisdiction is available or has been provided to that person to litigate those rights.

The next most important concession made by the WSBA is the recognition that neither the Disciplinary Board, the Disciplinary Counsel, nor the Board of Governors of the WSBA is a judicial officer of the State of Washington. This happens when the WSBA relies entirely upon ***the only document available in this litigation that was produced by true judicial officials,*** the ORDER of October 6, 1992, from the Supreme Court of Washington. This is an admission that the ***only*** state court action in the McLaughlin case was the denial of the petition for discretionary review in the Washington Supreme Court.

Further, by setting down the ORDER in the Appendix where it can be read, the WSBA necessarily has conceded

that the ORDER says nothing on its face. The ORDER clearly does nothing but deny discretionary review. On its face, the ORDER clearly indicates that no judicial proceedings were conducted or would ever be conducted on alleged violation of McLaughlin's federally secured rights, in a state court of competent jurisdiction.

Up to its armpits in its own quicksand, the WSBA now must insist, and does insist that the denial of the petition for discretionary review process was itself a "judicial proceeding", wherein the state court "*necessarily was required to review the case to determine whether or not it met one of the requirements of RLD 7.3(a)(1)-(4).*" But in so saying, the WSBA concedes that ***the state court did nothing more than consider the petition under the RLD 7.3(a)(1)-(4) criteria.***

The WSBA is stuck with the fact that Rule 7.3(a) does not address McLaughlin's federally protected rights, nor does it address the federally protected rights of the Okanogan County electorate. McLaughlin's Petition for Discretionary Review was submitted to the state court as part of her mandatory exhaustion of the administrative procedure provided by the RLD. Rule 7.3 merely sets the criteria for granting or not granting state court review of the administrative decision of the Bar.

Petition for discretionary review under RLD 7.3(a) has no more meaning as a judicial proceeding in state court than Supreme Court consideration of a petition for writ of certiorari has in the federal system. Judicial proceeding begins after the writ for review is granted. No judicial significance is given to denial of the petition for discretionary review.

II. ***The ORDER is no good to the WSBA argument.*** On its face, the ORDER shows that McLaughlin's federal claims were not addressed by the state court. We can not presume anything not shown in writing on the face of the ORDER. (If the federal claims had been addressed by the state court, the face of the ORDER would have shown it.) The state court says only that it considered "the motion and the

files herein". It did not even consider the transcript of the WSBA investigation hearing. ***All the state court determined by the ORDER was whether it wanted to entertain a review at its discretion, and the state court decided it did not choose to do so.***

Worse, in the BRIEF we find not only the failure of the WSBA's argument, but also the ***confession*** that the WSBA, under color of state law, actually did engage in depravation of the federally secured rights of McLaughlin and her community by abuse of its state rule making power and its state power to coerce attorneys. The BRIEF summarizes the WSBA Hearing Officer's conclusions, which conclusions show on their face that the WSBA was indeed engaging in unconstitutional abuse of power, depriving McLaughlin of her first amendment rights under color of state law, by regulation of her topical political speech uttered as a candidate for public office.

III. The BRIEF IN OPPOSITION is disingenuous:

(1) Despite the fact that RLD 7.3(a) states on its face that McLaughlin had no recourse as of right to judicial review of the WSBA action; and despite the fact that discretionary review by definition is not a right to review, the WSBA states in the BRIEF,

> *"Petitioner had recourse as of right to the State Supreme Court, which she exercised."*

What can the WSBA be talking about? There was no such thing as a recourse as of right in the facts of this case. This is shown on the face of RLD 7.3(a) criteria for state court discretionary review, quoted in the BRIEF, none of which relate to the federally protected rights of the subject attorney.

Furthermore, the WSBA is ***estopped*** by its own former statement from asserting that McLaughlin had "recourse of right" to the state court under RLD 7.3(a). Defendant McElroy, the WSBA disciplinary counsel who conducted the unconstitutional investigation of McLaughlin's constitutionally protected topical political speech, said in her

BAR ASSOCIATION'S RESPONSE TO PETITION FOR DISCRETIONARY REVIEW:

> *"The Supreme Court [of Washington] should not accept discretionary review of this case because this case does not meet the criteria for discretionary review stated in RLD 7.3.*
>
> *McLaughlin is not entitled to appeal of the Disciplinary Board's decision as a matter of right, because the Disciplinary Board did not recommend either suspension or disbarment. RLD 7.2(a). Since McLaughlin's case does not meet the criteria in RLD 7.3(a) for discretionary review of lawyer disciplinary cases, this Court should not grant her petition for review."*

(2) ***The WSBA fleshes out the ORDER in its BRIEF by adding facts that do not exist.*** On its face, the ORDER gives no reason for the denial of McLaughlin's petition for discretionary review in state court. However, in the BRIEF, the WSBA presumptiously fills the ORDER out itself, saying,

> *"The reason that the petition was denied is that the law is well-settled in Washington that the conduct engaged in by Petitioner is prohibited by the Rules of Professional Conduct, as adopted by the Supreme Court, and that the prohibitions are constitutional."*

The ORDER does not say that. Actually, the state court gave no reason, at all, why it denied McLaughlin's petition for discretionary review under RLD 7.3(a). It is unscrupulous for the WSBA to invent text not in the ORDER, to mislead the United States Supreme Court.

(3) Further, the BRIEF comments that McLaughlin *"apparently elected to disregard the judicial significance of the October 6, 1992 ORDER, and decided not to seek a writ of certiorari..."*

On its face ***the ORDER has no judicial significance.*** What McLaughlin actually realized at the time was ***that the denial of discretionary review of her***

censure and reprimand by the state court was virtually unappealable. Therefor, a petition to the U.S. Supreme Court to review the ORDER would have accomplished nothing.

Even if the Supreme Court of the United States chose to override the discretion of the state court and had ordered the state court to grant discretionary review against its will, that is all McLaughlin would have gotten decided. For all her trouble, she would only have achieved an unwilling state judicial review under the criteria of RLD 7.3, which would not address any federally secured rights of the Okanogan County community, or herself.

(4) The WSBA asserts that "the proceedings brought against the Petitioner is similar to that in *District of Columbia Court of Appeals vs. Feldman.*[2] In fact, ***the administrative proceedings within the WSBA and the petition to the state court in Feldman have absolutely nothing in common, procedurally.*** In *Feldman*, all of the proceedings were judicial, performed by judicial officials. *Feldman's* petition was submitted to the state court and a decision was rendered in that court. The WSBA's own BRIEF shows that McLaughlin never was allowed into a state courtroom. All she could do was ask to be let in. She was trapped by RLD 7.3 (a), outside the courtroom door.

(5) ***It is disingenuous to maintain that McLaughlin*** *"is seeking improper federal court interference in a state court disciplinary matter."* It is even disingenuous to say that this case arises out of a lawyer disciplinary proceeding in the state of Washington, when at the same time the BRIEF fails to rebut the McLaughlin statement that the WSBA is not a judicial officer in the State of Washington and that it has no power under Washington State Law to conduct disciplinary proceedings.

The only functions the WSBA has as an "arm" of the Washington State Supreme Court is to investigate violation of the RPC, and to serve as prosecutor of accused attorneys

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[2] Citation in Footnote 1

before the Supreme Court of Washington. This is fully set down by McLaughlin in her Petition and it remains unrefuted by the WSBA.

(6) The BRIEF becomes particularly disingenuous when it is pointed out that ***the WSBA has already been told in*** *Miller vs. WSBA*[3], the pertinent parts of which are set forth in the APPENDIX, to ***provide actual, adequate judicial proceedings in state court, not*** in the Disciplinary Committee of the Bar, or face 42 USC 1983 suits by attorneys on abuse of power, in federal district court.

The BRIEF itself sets down RLD 7.3(a) which shows that censure and reprimand are not state court disciplinary proceedings in Washington. The BRIEF refers to the ORDER of October 6, 1992, which shows on its face that judicial proceedings were never held in state court on the censure and reprimand imposed by the Disciplinary Board of the WSBA. *Miller* shows that the arguments on these points have already gone against the WSBA in the Ninth Circuit.

(7) ***The WSBA carefully words its STATEMENT OF THE CASE to create a false impression.*** *"Following a hearing, the Hearing Officer concluded"*, creates the impression that judicial proceedings in front of a Washington judicial official were held. In fact, the subject "hearing" was investigative, not judicial, and the "Hearing Officer" was a ***volunteer*** member of the WSBA. Under the Washington RLD, he had no judicial status or power, whatsoever. The RLD is constitutionally defective in this respect. (Which is one of the allegations in McLaughlin's 42 USC 1983 COMPLAINT.)

(8) ***It is disingenuous to refer to the Washington case*** *In re Kaiser*[4] in the BRIEF. The facts of that case are entirely different from the facts in the present case. The respondent Kaiser was a Washington judge. *In re*

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[3] Miller v. Washington State Bar Association, 679 F.2d 1313 (9th Cir. 1981); Rehearing, 691 F.2d 431 (9th Cir. 1982)[hereinafter called Miller]

[4] 111 Wn. 2d 275 (1988)

Kaiser was an actual judicial proceeding before the justices of the Supreme Court of Washington. The case was not tried under WSBA administrative rules, but under the Constitution of the State of Washington and the Rules of Judicial Discipline. The reference in the BRIEF to *Kaiser* is ***spurious***.

CONCLUSION

In its failure to carefully examine the ORDER and the state court proceedings from which it came, the Ninth Circuit irrationally used the "*MacKay* Rule" to elevate Section 28 USC 2283 over Section 42 USC 1983, without going through the necessary abstention analysis required when two federal statutes are in conflict. In so doing, the Ninth Circuit unjustly deprived the attorney McLaughlin and the electorate of Okanogan County of their federally guaranteed rights. These people have been unjustifiably prevented from vindicating those rights by means of litigation in the federal district court under 42 USC 1983.

Washington judicial candidates and the electorate are trapped by the constitutionally defective Rules of Professional Conduct, the defective Rules of Lawyer Discipline, the indifference of the Supreme Court of Washington to the First and Fourteenth Amendments to the Constitution of the United States, the self protective WSBA administrators, and the blind adherence to the "*MacKay* Rule" in the Ninth Circuit. The result is that no case such as McLaughlin's is examined critically to determine the nature and effect of the state court proceeding before abstention is imposed on the aggrieved attorney's 42 USC 1983 action in federal district court.

The "*MacKay* Rule" bars the only practical avenue open to reform of the defects in Washington's state regulation of attorneys. The WSBA leadership is short-termed and volunteer. The membership is scattered and uninvolved. Self-interested persons and political zealots easily take over the administration of the WSBA, as in the McLaughlin incident, and inflict unconstitutional censures for their own political purposes. The Supreme Court of Washington is

indifferent, refusing to be bothered with what it regards as internal WSBA administrative decisions.

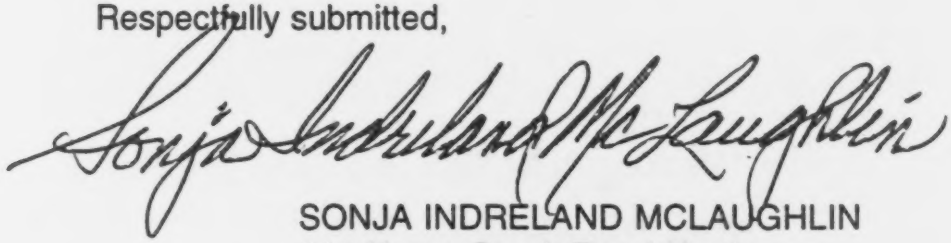
The 42 USC 1983 action in federal district court would expose the defective WSBA rules and open the way for reform. The Ninth Circuit has to be corrected on the "*MacKay* Rule", so that the attorney citizens of that Circuit can function under the same laws as the rest of the people of the Nation. Even in the State of Washington, there is no other state regulated profession which places restrictions on the excercise by members of topical political speech.

Government reform is what Congress intended 42 USC 1983 to help citizens accomplish. The "*MacKay* Rule" must be abolished as a general rule of abstention in order that these governmental reforms can be accomplished. Attorney litigants need to enter into federal court on the same basis that other citizens enter under federal question jurisdiction, to fight abuse of state power, using 42 USC 1983.

Once and for all, the Supreme Court must make clear that all federal court abstentions are decided on a case by case basis, on the facts unique to each case. Only then will we be able to say that there is no longer a "general rule" of abstention that applies to attorneys-but-to-nobody-else in federal jurisprudence in the United States of America.

Dated this 28th day of August, 1997.

Respectfully submitted,



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APPENDIX

Part of the Ninth Circuit opinion in *Miller v. Washington State Bar* ***is set down hereinbelow for the convenience of the Supreme Court. Summary of the facts of Miller is as follows:***

The *Miller* ***case is almost identical on the facts to the McLaughlin case, except that the public interest is not involved.***

Anton Miller was a Washington attorney who published a poem critical of the Supreme Court of Washington in a local newspaper. The WSBA found the poem offensive and imposed a letter of admonition into the permanent WSBA record that it was keeping on Miller. The record was open to the public. No recourse of right was available to Miller, as in the McLaughlin incident, to a state court of competent jurisdiction for state court adjudication of Miller's first ammendment rights. Miller filed a 42 USC 1983 action in federal district court and was dismissed on a F.R.Civ.P. 12(b)(1) motion, under the "MacKay Rule".

An alert Ninth Circuit panel refused to uphold the dismissal of Miller's 42 USC 1983 action on jurisdictional grounds based on *MacKay*. ***Miller's action was allowed to proceed to trial in the district court. Unfortunately, Miller settled out of court and the WSBA soon forgot the lesson learned from the litigation. In the present action, McLaughlin cited*** *Miller* ***to the Ninth Circuit judges, but the case was ignored in favor of the convenience of the*** *"Mackay* ***Rule".***

QUOTATIONS FROM THE DECISION:

Miller v. Washington State Bar Association, 679 F.2d 1313 (9th Cir. 1981); Rehearing, 691 F.2d 431 (9th Cir. 1982)

Page 1315:

[1] In urging that the State Bar and its disciplinary committees are immune from scrutiny in federal courts regarding alleged violations of attorneys' constitutional rights, the State Bar relies upon the decision of this court in *MacKay v. Nesbett*, *supra.* That case, however, involved an attorney's attempt to review in federal district court orders of the Alaska Supreme Court suspending him from practice. This court's denial of jurisdiction did not create a blanket immunity for state bar associations from federal review in disciplinary matters. Rather, the court, relying on Theard v. United States, 354 U.S. 278, 281, 77 S. Ct. 1274, 1276, 1 L.Ed.2d 1342(1957), merely held that orders of a state supreme court relating to discipline and disbarment of members could be reviewed only by the United States Supreme Court on certiorari, and not by means of original action a lower federal court. *MacKay* is leading authority for that proposition and has been followed by other courts in rejecting suits challenging state supreme court disciplinary actions....

The MacKay rule does not operate to bar this suit, as there has been no order (of discipline or disbarment) of the Washington Supreme Court or of any other state court. The only action taken has been that of the disciplinary committee, and Miller was expressly told that review was unavailable. The dual predicates for application of the MacKay rule are a prior state court order, and the availability of a petition to the United States Supreme Court. Both are lacking here.

The State Bar contends that we should accord the same deference to the disciplinary committee as we do to judicial action, on the theory that the committee is an agent of the Washington Supreme Court. The fact that the court has delegated some of its exclusive authority in disciplinary matters, *see, State ex rel Schwab v. Washington State Bar Association,* in such a way that some administrative actions are effectively final and unreviewable, is in our view further justification for the availability of federal court scrutiny when constitutional rights are involved.

The important distinction between administrative and judicial actions in bar disciplinary matters was recognized in *Polk vs. State Bar of Texas,* 480 F.2d 998(5th Cir. 1973). Polk had sued in federal district court to enjoin publication in the state bar journal of a reprimand issued by a bar grievance committee. The district court dismissed the suit on the authority of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 748, 27 L.Ed. 2d 669 (1971). The conclusion reached, similar to that reached by the district court in this case, was that federal courts should not interfere with state bar disciplinary proceedings. The Fifth Circuit reversed, emphasizing the distinction between administrative and judicial proceedings. The lack of any provision for state judicial review was also noted. For those reasons, the court of appeals remanded for consideration of the first amendment claim. *See also, Getty v. Reed, 547 F.2d 971 (6th Cir. 1977).* We reach a similar result.

Fully consistent with our holding is the influential report of the special committee established by the American Bar Association to study disciplinary problems and procedures, commonly referred to as the Clark Committee. The committee concluded that when a state supreme court is vested with the ultimate disciplinary power, it should assure a means whereby it exercises that authority. *ABA Special Committee to Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 95 (Final Draft, June 1970)(the Clark Report)*...the report also stressed that because the ultimate disciplinary power lies with the court, the attorney should be entitled to insist, as a matter of right upon formal disciplinary proceedings which would ensure ultimate judicial review. *Clark Report* at 90-96. The report is strong support for our conclusion that the deference accorded state court disciplinary proceedings in MacKay is wholly inappropriate when the federal plaintiff mounts a constitutional challenge to disciplinary sanctions imposed in a state administrative proceedings from which he has no recourse of right to a state court...

Since no review is available as of right in the state courts, we hold that such review is available in federal court for consideration of plaintiff's constitutional claim.

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The* Younger *v. Harris* reference in the BRIEF IN OPPOSITION has already been very effectively met in the second *Miller* opinion:

Miller v. Washington State Bar, REHEARING:
Page 431:

"In contrast [to the plaintiff in Middlesex], when Miller filed his federal action the Bar had completed it proceedings and Miller was and continues to be without any right to obtain review by the Washington Supreme Court. This case involves no intrusion into ongoing state proceedings, nor is there adequate opportunity for state court review. *Younger* abstention is, therefore, not appropriate in this case.